BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Application by Ameritech Michigan	)	CC Docket No. 97-137
Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to	)	
Provide In-Region InterLATA	)	
Services in Michigan	)	

PETITION TO DENY

SPRINT COMMUNICATIONS COMPANY L.P.

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ITS ATTORNEYS

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Sprint Communications Company L.P. ("Sprint"), by its attorneys, petitions the Commission to deny the above-captioned application of Ameritech Michigan ("Ameritech"). Ameritech's application does not meet the statutory standards and must be denied.

I. INTRODUCTION AND SUMMARY.

The pending application presents the Commission with more than the obvious opportunity to deny another unjustified application filed under Section 271: It gives the Commission the opportunity to discourage the filing of more unjustified applications. By signaling its clear disapproval of the careless attitudes reflected in BOC Section 271 filings to date, the Commission can also return public and private resources back to the task of opening local phone markets.

Ameritech's filing responds to the statute's requirements as if they were mechanical exercises without underlying content and without public interest consequences. Ameritech appears to believe that it need only recite back the statute's language to the Commission -- without the underlying performance that the words and

their meaning in fact command. Until and unless Ameritech begins to take the Section 271 thresholds more seriously, it should not be allowed to waste the FCC's and the public's time.

Congress determined in Section 271 that interLATA entry by a BOC is not appropriate until the FCC is able to find that the barriers to local entry have, in fact, been effectively lowered, that genuine facilities-based competition has emerged, and that the presence of such competitors effectively restrains the BOC's ability to use its local monopoly to harm competition in the long distance market. This hasn't happened in Michigan.

II. AMERITECH HAS NOT DEMONSTRATED COMPLIANCE WITH SECTION 271(c)(1).

Section 271(c)(1) was designed to ensure that petitioning BOCs were not granted interLATA entry until and unless the FCC found that local competition has been truly enabled.[1] To that end, a BOC seeking interLATA entry under Section 271(c)(1)(A) (Track A) must demonstrate that it "is providing access and interconnection" to unaffiliated providers of "telephone exchange service" pursuant to one or more State-approved interconnection agreements. See 47 U.S.C. § 271(c)(1)(A) (emphasis added). The "access and interconnection" being provided by Ameritech must include "each" of the fourteen checklist items,[2] and the checklist must

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1 See, e.g., Chairman Reed Hundt, Speech before The Competition Policy Institute (January 14, 1997)(The FCC's decision on Ameritech's Section 271 application will "turn in large part on whether the petitioner's local market is open to competition.").

2 Section 271(c)(2)(B).

be "fully implemented."[3] Because Ameritech has not shown that is providing each of the fourteen elements of the competitive checklist to one or more competitors in a manner that permits new entrants commercially viable interconnection and access, its application must be denied.

A. Ameritech Is Not "Providing" Access And Interconnection As Required By Section 271.

Ameritech concludes that it "is currently providing all Checklist items to Brooks Fiber, MFS . . . and TCG." (Mayer Aff. at ¶ 13; Br. at 15). Ameritech repeatedly admits, however, that none of those three firms has in fact been furnished with unbundled switching in Michigan. (Br. at 15-16 & 36; Mayer Aff. at ¶¶ 223 & 228; Kocher Aff. at ¶ 47; Edwards Aff. at ¶ 83). Thus, Ameritech's use of the term "providing" does not mean that all fourteen checklist items are being received by competitors. Indeed, Ameritech expressly concedes that it actually "furnishes" only thirteen of the fourteen checklist items to the CLECs. (Br. at 15; Mayer Aff. at ¶ 13). Likewise, Ameritech's substitute term "furnish" does not contemplate that Ameritech provides the items pursuant to interconnection agreements because at least one of the so-called "furnished" items -- unbundled common transport -- is being supplied only under tariff and not, as required by Section 271(c)(1)(A), pursuant to approved interconnection agreements. (Br. at 45; Edwards Aff. at ¶ 93 & Sched. 2.6). By Ameritech's own admission, then, there are at least two checklist items which are not being "provided" pursuant to approved interconnection agreements. Its application must be denied on this basis alone.

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[3] See Section 271(d)(3)(A).

Ameritech cannot salvage its application by arguing that it meets the "is providing" requirement by "making available" the two missing checklist items. (Br. at 18-21). That argument is based on Ameritech's claim that Congress intended the term "is providing" to mean "make available" because otherwise a BOC would be prohibited from interLATA entry in any instance where "no competitor elects to take" one or more checklist items. (Br. at 18-20). Ameritech asserts that this is the case here as its "experience in Michigan has shown [that] it is entirely possible that . . . there may be certain checklist items that no carrier will choose to buy." (Br. at 18).[4] With a degree of contrived confusion that can only be viewed as cynical, Ameritech states that competitors "must have concluded that they do not need the item[s] to compete

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[4] Ameritech claims, wrongly, that the Justice Department has agreed with its view of the phrase "is providing." (Br. at 19). Both Ameritech and the Department of Justice posit a hypothetical -- not applicable here as discussed in the text below -- where a checklist item is not being provided solely due to CLEC disinterest in an otherwise fully compliant offer by the BOC. See Br. at 18-20; DOJ Evaluation, CC Docket 97-121 at 22-23 (May 16, 1997). The Department otherwise insists, properly so, that all items be actually provided to meet the requirements of Section 271. See DOJ Evaluation at 23 n.30 & 25-26. Even where the item has not been requested by a CLEC, the Department's standard is far more rigorous than that posed by Ameritech. See id. at 23-24("[A] BOC is 'providing' a checklist item only if it has a concrete and specific legal obligation to provide it, is presently ready to furnish it, and makes it available as a practical, as well as a formal, matter"). The Michigan Attorney-General has likewise concluded that a BOC must provide access and interconnection "in a fully functional manner." See Attorney General Response, MPSC #U-11104 at 2 (March 28, 1997)(Vol. 4.1, Part 9).

To the extent Ameritech is really arguing that "offer" is close enough to "provide," that position is just plain wrong. Sprint has already fully briefed to the Commission the reasons why the theoretical availability of all checklist items in a contract or tariff will not satisfy the statutory standard that each and every checklist item actually be "provided" by the applicant BOC. See Sprint Petition to Deny, CC Docket No. 97-121 at 15-19 (May 1, 1997). Those arguments are incorporated by reference here.

successfully in the local market." (Br. at 18). But Ameritech in fact knows better. AT&T, MCI, WorldCom, and LCI have each documented significant efforts and problems in their attempts to obtain unbundled switching and unbundled transport from Ameritech.[5] These disputes include filings before the FCC,[6] a federal lawsuit filed by AT&T concerning its arbitrated interconnection agreement with Ameritech (including the manner in which the BOC is interpreting its duty under the agreement to provide these two elements),[7] and filings before the Michigan Commission detailing significant deficiencies in Ameritech's offerings of unbundled transport and switching offerings.[8]

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5 According to those companies, Ameritech's unbundled switching and transport offers do not offer CLECs common transport as an unbundled network element. Rather, Ameritech forces CLECs purchasing unbundled local switching to obtain transport between each Ameritech end office, *i.e.*, to duplicate the BOC's entire network. That, argue the CLECs, is contrary to the Interconnection Order as it deprives competitors of the ability to partake in Ameritech's economies of scale. See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499, 15508-09 ¶¶ 10-13 (1996)("Interconnection Order"). In addition, Ameritech's unbundled switching offer restricts CLECs' rights to collect terminating access charges. Finally, both AT&T and MCI noted that, unlike Ameritech, most other BOCs offer some form of common transport. See Sherry Aff. at 3-23, attached to AT&T's Information Submission, MPSC #U-11104 (May 7, 1997)(Ameritech App. Vol. 4.1, Part 13); Ankum Aff. at 3-21, attached to MCI's Response to Ameritech Information Filing, MPSC #U-11104 (April 25, 1997)(Ameritech App. Vol. 4.1, Part 13), *Ex Parte* Letter in CC Docket Nos. 96-98 & 97-137 from Linda Oliver, counsel to WorldCom, Inc. to William Caton, Acting Secretary, Federal Communications Commission 2-7 (May 23, 1997).

6 See id.

7 See AT&T Complaint, No. 97-72136 (E.D. Mich. filed May 5, 1997)(noting Ameritech's refusal to provide common transport or permit AT&T to charge terminating access fees).

8 See Letter from Douglas W. Kinkoph, Director Legislative-Regulatory Affairs, LCI International, to John G. Strand, Chairman, MPSC, 2 (March 27, 1997)(Vol.

The record therefore reveals that competitors are seeking both unbundled switching and transport but that Ameritech in fact is not "providing" or even offering such items within the terms of the statute.

B. Ameritech Does Not Face "Facilities-Based" Competitors for Local Exchange Services: Unbundled Elements Should Not Be Deemed to Satisfy the Statute.

By its very subtitle, Track A requires the "Presence of a Facilities-Based Competitor." Section 271(c)(1)(A) is satisfied only where one or more competitive LECs offer service to both residential and business subscribers either exclusively or predominantly over facilities that they own. This is clearly the most natural and logical reading of the phrase "over their own telephone exchange facilities."

The legislative history of Section 271 is replete with indications that Congress intended that only carriers with independent facilities would satisfy the Section's requirements. For example, the Conference Committee Report states:

> This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities (*e.g.*, central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.[9]

As this statement demonstrates, Congress allowed a carrier providing services "predominantly" over its own independent facilities to qualify under Section 271(c)(1)(A) solely because it thought it unlikely that there would be any competitors able to rely

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4.1, Part 9).

[9] S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 148 ("Conference Report").

exclusively on their own facilities. The import is that a carrier qualifying as facilities-based would, under any circumstances, have substantial independent facilities.[10]

The factual record here is not in doubt: Ameritech has not offered proof of any noticeable independent facilities construction. To the contrary, the minimal amount of CLEC activity is achieved principally through resale or leasing of some unbundled network elements ("UNEs"). Ameritech tries to get around this problem by equating UNEs with a CLEC's "own" facilities, an argument for which it finds support in the Commission's recent decision[11] to treat the phrase "own facilities" in Section 214(e) to include UNEs. (See Br. at 14).

The Commission need not and should not apply its interpretation of "own" facilities in Section 214(e) to the use of "own" telephone exchange facilities in Section 271(c)(1)(A). An administrative agency may attribute different meanings to the same term appearing in different parts of the same statute where the term in question is ambiguous and the agency's different interpretations are reasonable.[12] This principle is

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10 If this had not been Congress' intent, there would have been no need even to discuss the likely existence of "redundant" networks that may need to lease "some" of the incumbent's network in describing the purpose of Section 271(c)(1)(A). This conclusion is reinforced by the Conference Committee's statement that the entry of cable companies (the only source of an independent wire into the home) into the local telephone market "hold[s] the promise of providing the sort of local residential competition that has consistently been contemplated." See Conference Report at 148 (emphasis added).

11 See Federal-State Board on Universal Service, *Report and Order*, CC Docket No. 96-45, ¶ 160 (rel. May 8, 1997) ("Universal Service Order").

12 See, e.g., Comite Pro Rescite De La Salud v Puerto Rico Aqueduct and Sewer Auth., 888 F.2d 180 (1st Cir. 1989) (holding that different EPA interpretations of the phrase "domestic sewage" appearing in different sections of the same

especially applicable where, as here, the two statutory provisions in question serve different purposes.[13]

The Commission has stated that it finds the term "own" as used in Sections 214(e) and 271(c)(1)(A) to be ambiguous, and further that Congress provided no indication in the statute as to whether UNEs qualify as a carrier's "own" facilities.[14] The Commission still has substantial discretion under the Chevron[15] doctrine to define the word "own" more narrowly in the context of Track A than in the universal service context.[16] Such an approach reasonably furthers the purpose of the two provisions.

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statute are reasonable) (opinion by Breyer, J.); National Association of Cas. and Sur. Agents v. Board of Governors, 856 F.2d 282 (D.C. Cir. 1988) cert. denied, 490 U.S. 1090 (1989) (upholding a Federal Reserve Board decision that rights held pursuant to a statutory grandfather clause applicable to a "bank holding company" may be transferred with corporate ownership despite the fact that the Board, in a separate decision, held that rights held under another grandfather clause in the same section of the statute that also applied to a "bank holding company" were nontransferable); Common Cause v FEC, 842 F.2d 436 (D.C. Cir. 1988) (upholding FEC's interpretation of the word "name" despite the fact that the agency attributed a different meaning to the same word as used in a different section of the same statute) (dissent by Ginsberg, J.R.B.).

13 See Comite Pro Rescite De La Salud, 888 F.2d at 187; Common Cause, 842 F.2d at 441-442.

14 For the reasons given above, Sprint respectfully suggests that the term "own" facilities within the context of Section 271 (its language and legislative history) is in fact unambiguous and that application of its "plain meaning" -- independent facilities -- answers the instant question without need for further inquiry. To the extent the Commission finds the term ambiguous, the remaining discussion shows the FCC's clear discretion to define it in this way in order to perfect legislative policy, regardless of the ultimate correctness of the FCC's determination in Section 214(e).

15 See Chevron U.S.A., Inc. v. National Res. Def. Council, 467 U.S. 837 (1984).

16 See Comite Pro Rescite De La Salud, 888 F.2d at 187 (where Chevron deference applies to agency's task of resolving interstitial legal issues, "it does

The purpose of Section 214(e) is to make federal subsidies portable among different carriers. As the Commission has found, Congress' pro-competitive goals are served by reading the eligibility requirements of Section 214(e), including the "own facilities" requirement, expansively.[17]

The purpose of Section 271(c)(1)(A), on the other hand, is to ensure that BOCs' local markets have been irreversibly opened to competition before they are permitted into the long distance market. In contrast to resale or the leasing of UNEs, only the construction of and investment in independent facilities exhibits the kind of irreversible entry which the Department of Justice has correctly described as necessary under Section 271.[18] In specifying that certain carriers, such as cellular carriers,[19] shall not qualify as "facilities-based" under Track A, Congress indicated that the references to

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not seem odd to find the agency interpreting the same words somewhat differently as they apply to different parts of the statute, in order to permit the statute to fulfill its basic congressionally determined purposes").

17 See Universal Service Order at ¶ 144 (refusing to add to the statutory eligibility requirements because additional requirements would chill competitive entry into high cost areas); id. at ¶ 147 (finding that CMRS carriers can be designated as eligible for subsidy reimbursement)

18 To have confidence that the market has been irreversibly opened to competition, one must observe more than a minimal amount of CLEC activity. Both the terms of Track A and the public interest standard require that this criterion be met. As discussed in section V.A., infra, it is not met here.

19 See 47 U.S.C. § 271(c)(1)(A) ("For the purpose of this subparagraph, services provided pursuant to subpart K [sic] of part 22 of the Commission's regulations (47 C.F.R. 22.901 [sic] *et seq.*) shall not be considered to be telephone exchange services."). By excluding from eligibility cellular services (which are the services provided pursuant to 47 C.F.R. § 22.901), Congress excluded cellular carrier facilities from the definition of "own telephone exchange facilities."

facilities-based carriers should be read narrowly in that provision. It is therefore eminently reasonable for the Commission to attribute to "own" a narrow definition (one that excludes UNEs) under Track A, notwithstanding its prior decision to interpret the word broadly in the universal service context.[20]

Finally, regardless of the merits of the Universal Service Order, the Commission should not apply the rationale used in that Order to Section 271. In the Universal Service Order, the Commission relied on its ruling in the Interconnection Order that a CLEC should (where possible) have "exclusive use" of a UNE to do what it wishes with it.[21] The Commission asserted that such exclusive use, as well as the concomitant right to use UNEs to provide services not offered by the ILEC, renders a UNE lease more akin to an ownership than to a resale relationship. But, as demonstrated below, in most cases CLECs do not in fact have the ability to exclude others from using leased UNEs.

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20 Ironically, equating "own" with "leased" in Section 271(c)(1)(A) would only result in differing treatment of another phrase ("facilities of") in different sections of the statute. Track A refers to one or more agreements under which the BOC is providing access and interconnection "to its network facilities for the network facilities of one or more unaffiliated competing providers . . . ." The phrase "facilities of" a carrier is consistently used elsewhere in the statute to refer to separate and independent physical facilities. Thus, Section 251(c)(2) refers to interconnection with "the facilities and equipment of any" requesting carrier and Section 251(a)(1) again refers to the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." However, since a carrier that relies solely on UNEs does not need to interconnect independent facilities, the phrase "facilities of" will not mean independent facilities under Ameritech's reading of Track A.

21 See Universal Service Order at ¶ 160 ("In the context of Section 214(e)(1)(A), unbundled network elements are the requesting carrier's 'own facilities' in that the carrier has obtained the 'exclusive use' of the facility for its own use in providing services, and has paid the full cost of the facilities, including a reasonable profit to the ILEC.").

Lessees are also dependent on Ameritech's cooperation and consent to use UNEs to provide services that differ from those offered by the incumbent. Thus, the FCC's reasoning in the Universal Service Order cannot be relied upon to find that UNEs are a CLEC's "own telephone exchange facilities" for the purposes of this Section 271 application.

Most UNEs are shared facilities and simply cannot be separated from the rest of the ILEC's network and provided to a CLEC on an exclusive basis. The Commission recognized this fundamental fact in the Interconnection Order:

> For some elements, especially the loop, the requesting carrier will purchase exclusive access to the element for a specific period, such as on a monthly basis. Carriers seeking other elements, especially shared facilities such as common transport, are essentially purchasing access to a functionality of the incumbent's facilities on a minute-by-minute basis.[22]

Indeed, in addition to common transport, the phrase "access to a functionality of the incumbent's facilities" more accurately characterizes numerous unbundled elements, including (1) basic switching functionalities (including vertical features), (2) SS7 signaling as well as access to call-related databases and Service Management Systems, (3) functionalities performed by an ILEC's OSS, and (4) operator services and directory assistance functionalities. Each of these UNE relationships diverges from the "exclusive use" paradigm in which the CLEC leases a dedicated trunk for a period of time.[23] Under such circumstances CLECs do not have exclusive leaseholder rights to UNEs.

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[22] See Interconnection Order, 11 FCC Rcd at 15631, ¶ 258.

[23] Despite the Commission's statement in the Interconnection Order quoted above,

Furthermore, Ameritech asserts that there are significant technical limitations on the extent to which a requesting carrier can use UNEs as it wishes.[24] Thus, any attempt to use a UNE in a way not already used by Ameritech or to bundle UNEs in a novel manner requires the CLEC to rely on the BOC's engineers to determine whether the arrangement is technically feasible and will not jeopardize network reliability.[25] Legal uncertainties such as those surrounding intellectual property rights similarly underscore the BOC's ongoing control of the network element being leased.[26] The point here is not to debate whether this reluctance on Ameritech's part is legitimate. But it strains credulity to assert that this sort of arrangement offers the CLEC exclusive dominion over UNEs.

III. AMERITECH HAS FAILED TO DEMONSTRATE COMPLIANCE WITH THE COMPETITIVE CHECKLIST.

Section 271(c)(2) requires that the specific access that is being provided meet "each" of the items set forth in the competitive checklist of that section, including most especially interconnection "in accordance with the requirements of sections 251(c)(2) and 252(d)(1)," and "non-discriminatory access to network elements in accordance with

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even loops, where aggregated at fiber feeder systems, involve shared facilities.

24 See Edwards Aff. at 26-27 & 30-31.

25 See Edwards Aff. at 25-26 (describing the Bona Fide Request procedure applicable where a carrier seeks, (1) to interconnect "at a new point or to purchase access to new or different unbundled elements," (2) interconnection or access to UNEs that is "different in quality from what Ameritech provides itself," or (3) a customized service or a new combination of network elements.)

26 See Petition of MCI For Declaratory Ruling, Public Notice, File No. CCBPol 97-4; CC Docket No. 96-98 (rel. March 14, 1997).

sections 251(c)(3) and 252(d)(1)," the critical pricing provisions. Ameritech has failed to demonstrate compliance with these provisions.

A. Interconnection And Access Terms And Conditions Are Not In Compliance.

The Commission has decided that interconnection prices, to be reasonable and pro-competitive, should be set at TELRIC. Ameritech has not submitted rates based on TELRIC, and thus has not complied with the Commission's prerequisites.

While Sprint believes the Commission has independent authority under Section 271 in this area,[27] it is unknown at this time what rules will govern interconnection agreements under Sections 251 and 252. The Eighth Circuit has stayed many of the Commission's rules concerning interconnection and has pending before it numerous appeals raising issues broader than those contained in the stay. Thus, Ameritech's application forces the FCC to analyze Ameritech's submission at a time when legal uncertainties predominate. Especially given Ameritech's insistence that its interconnection agreements must be modified to reflect any changes stemming from the Eighth Circuit's decision,[28] those interconnection agreements are not really final: They are subject to change on very fundamental issues.[29] Given these circumstances,

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27 See Sprint Petition to Deny, CC Docket No. 97-121 at 7-9 (May 1, 1997).

28 See Br. at 4 n.5 (Ameritech "will comply with any revised regulations adopted to comply with any action taken by the court of appeals."). Ameritech put it much more plainly in an affidavit accompanying its earlier Section 271 application for Michigan. See Dunny Aff., CC Docket 97-1 (Vol. 2.1) at ¶ 8 (Should Ameritech and the BOCs prevail on their interconnection challenges, "Ameritech Michigan's contracts will be modified accordingly.").

29 Sprint does not mean to suggest that Ameritech has the legal authority to insist

checklist compliance cannot be found at this time.

The uncertainty of national rules is crucial because the MPSC has viewed itself legally disabled until recently from applying TELRIC to set rates.[30] The MPSC therefore held Ameritech to TSLRIC requirements (thus substantially increasing the proportion of joint and common costs, the misallocation of which is especially difficult to detect) in reviewing interim rates. The MPSC apparently plans to apply TSLRIC to establish permanent rates as well.[31]

Even under the MPSC's standards, the rates relied upon by Ameritech in its agreements are inherently suspect. The MPSC has already rejected the Ameritech cost studies upon which its interim rates are based.[32] Further, the MPSC has noted

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upon unilateral changes to these agreements; indeed one could question its ability to do so. But for Section 271 purposes, it is sufficiently telling of the uncertain posture of these agreements that Ameritech has asserted the right to do so.

30 Section 352 of the Michigan Telecommunications Act states that interconnection prices "shall be at the provider's total service long run incremental cost of providing the service" until January 1, 1997.

31 See On The Commission's Own Motion, to Consider the Total Service Long Run Incremental Costs and to Determine the Prices of Unbundled Network Elements, Interconnection Services, Resold Services, and Basic Local Exchange Services for Ameritech Michigan, *Order Initiating Proceedings*, MPSC Case Nos. U-11280, U-11281, U-11224 (December 12, 1996) (ordering Ameritech Michigan to file comprehensive TSLRIC studies as the basis for establishing permanent rates for UNEs).

32 See Application of Ameritech Michigan for Approval of New TSLRIC Studies, *Order,* MPSC Case Nos. U-11155 & U-11156 at 6-7 (Dec. 12, 1996)("TSLRIC Study Order")(attachment 10 to MPSC Comments to FCC in CC Docket 97-1 (Feb. 5, 1997)(Vol. 4.1, Part 8)). Ameritech submitted the same cost studies in the AT&T arbitration as the foundation for its prices there. See Palmer Aff. at ¶ 14.

that Ameritech's filings "have led to a plethora of TSLRIC studies and rate proposals, many with differing results" for the same elements.[33] Indeed, the MPSC staff observed that Ameritech had submitted "vastly different loop costs and [requested different] prices" in different MPSC proceedings "despite the fact that, in each case, Ameritech Michigan claimed that the prices and costs were based on the application of TELRIC principles."[34] Ameritech's interim prices were acquiesced in by the MPSC because the cost studies more closely approximated "the TSLRIC methods required by the Act . . . than any others submitted by Ameritech Michigan" and because the lack of interim prices might delay the onset of competition.[35] In so doing, the MPSC stated expressly that "all issues regarding TSLRIC studies and rates for Ameritech Michigan's unbundled loops, ports, interim number portability, and local call termination should be resolved" in the permanent cost proceeding.[36]

Ameritech has nevertheless chosen to file this application prior to the Michigan PSC's completion of pending proceedings to develop cost studies and permanent rates.[37] Trying to jump the state role, Ameritech would now have the FCC adjudicate

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33 See id. at 7.

34 Id. at 6. Some of the different proceedings referenced by the MPSC staff were the interconnection proceedings involving Brooks Fiber, AT&T, MCI, and Sprint, and proceedings to determine the price of Ameritech's UNEs.

35 Id. at 7.

36 Id.

37 The MPSC's proceeding, Docket No. U-11280, to determine the proper TSLRIC for all elements, products and services required by the Interconnection Order or covered under Ameritech's agreements with AT&T and or Sprint is ongoing.

whether its interconnection prices reflect, for example, a reasonable allocation of shared (i.e., joint and common) costs across UNEs.[38] This end-run around the MPSC's permanent cost proceeding directly contradicts Ameritech's litigation position in the Eighth Circuit proceeding[39] as well as the Commission's own rational assessment that the states are in a superior position to implement nationally set costing standards.[40]

Ameritech also seeks to deflect the problem of unlawful rates in the special case of rates for interim number portability. Ameritech states that it has deferred collection of interim number portability charges until the MPSC creates a methodology for the competitively neutral recovery of costs. (Palmer Aff. at ¶ 22). To the extent Ameritech is suggesting that the illegal nature of these rates need not be considered since collection of them has been deferred, that suggestion should be summarily rejected. It is plainly part of Ameritech's Section 271 burden to demonstrate *reasonable* rates for number portability. Ameritech cannot avoid FCC consideration of its excessive number portability rates by the artifice of "suspending" collection of such charges. Such charges are actually accruing, and, unless changed, will have to be paid.

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38 See Broadhurst Aff. at ¶¶ 6-7.

39 In its brief to the Eighth Circuit, Ameritech stated that it "adopts and incorporates" the RBOCs/GTE's and NYNEX's briefs "to the extent that those briefs contend that the FCC lacked jurisdiction to issue regulations governing the pricing of intrastate services." See Ameritech Brief in Iowa Util. Bd. v. FCC, No. 96-3321 at p. i (Nov. 18, 1996). The RBOC position was that the 1996 Act "entrusts pricing authority exclusively to the States" and that the FCC therefore "has no role in pricing." See, e.g., RBOCs/GTE Brief in Iowa Util. Bd. v. FCC, No. 96-3321 at 26-31 (Nov. 18, 1996).

40 Interconnection Order, 11 FCC Rcd 15557-15568, ¶¶ 111-137.

Moreover, any objective evaluation discloses that, at this time, interim number portability services in Michigan are not priced in accordance with state law. The MPSC accepted interim rates for Ameritech's remote call forwarding and direct inward dialing services, but did so with the express recognition that the rates were based on flawed and erroneous Ameritech cost studies.[41] Thus, the charges that are accruing are facially unreasonable, and their excessive levels, while not being collected, may nevertheless be presumed to have a current chilling effect on new entry. The application fails on this ground as well.

B. Uncertainties Surrounding Ameritech's MFN Obligations Make Reliance upon the AT&T Agreement Defective.

It is also not known at this time whether the Commission will be able to fully enforce the "most favored nation" (or "pick and choose") obligation of Ameritech as set forth in Section 252(i). That section requires ILECs to make available "any interconnection, service or network element" provided under an interconnection agreement to which it is a party "to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." The most favored nation provision thus establishes the central mechanism for enforcing the requirement that access and interconnection services on the checklist be truly available and provided in a nondiscriminatory manner.[42]

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41 See TSLRIC Study Order at 6-7 (Vol. 4.1, Part 8).

42 See 47 U.S.C. § 271(c)(2)(B)(ii), (iii), (vii), (ix), (x), (xii). In addition, incumbents are required to provide interconnection, access to unbundled elements and the other services mandated by Section 251(c) on a nondiscriminatory basis. See generally 47 U.S.C. § 252(c).

As the FCC recognized in its First Report and Order implementing Sections 251 and 252 of the Communications Act, this scheme will work only if third parties can obtain access to any individual interconnection, service or network element arrangements contained in an approved interconnection agreement.[43] Indeed, the more disaggregated the approach to MFN, the more effectively it will work to prevent discrimination and to lower the barriers to local entry. This is because each new entrant will likely require a different arrangement of checklist services for entry. Moreover, bundled offerings by the incumbent LEC may be in reality discrimination schemes in contravention of the statute. Thus, MFN should be implemented to allow competitors to pick and choose specific aspects of existing interconnection agreements to essentially create their own agreements.

Of course, the Eighth Circuit's stay pending appeal of the FCC's MFN rules has left the status of that provision under Section 252 uncertain just at the time when new entrants are planning their entry strategies and negotiating interconnection agreements.[44] Ameritech has taken the view before the Eighth Circuit that the "pick

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43 See Interconnection Order, 11 FCC Rcd at 16137, ¶ 1310.

The roles of the Track A Section 271(c)(2)(B) requirements and the MFN Section 252(i) obligation are thus complementary. Compliance with Section 271(c)(2)(B) pursuant to Track A requires that the incumbent is actually providing all of the checklist items pursuant to "one or more" interconnection agreements. Compliance with Section 252(i) requires that each term of those agreements be available to any requesting carrier on the same basis. The combination yields confidence that additional competitors are also able to enter and expand by utilizing the existing agreements.

44 See Iowa Utils. Bd. v FCC, No. 96-3321 (8th Cir. Oct. 15, 1996).

and choose rule" (most favored nation) is "contrary to the Act and should be overturned."[45] In its commercial practices, Ameritech refused to accommodate Sprint's request for a comprehensive MFN provision in its interconnection agreement arbitration. Similarly, it apparently at one time interpreted its MFN clause to deny TCG the ability to purchase individual network elements from other interconnection agreements.[46]

More recently, however, Ameritech has taken the position that any CLEC "is entitled to adopt, on an element-by-element or service-by-service basis, provisions in other parties' approved agreements" pursuant to either the CLEC's contractual MFN clause or its "independent right under Section 252(i)."[47] Ameritech now states that "it no longer adheres" to its position that MPSC approval is needed before any amendment to an interconnection agreement made pursuant to an MFN clause or Section 252(i) becomes effective. (Edwards Aff. at ¶ 17). Sprint would find some comfort in those changes of heart, but for the fact that Ameritech has at the same time insisted that its interconnection arrangements will be altered to reflect the Eighth Circuit

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45 Ameritech's brief in the Eighth Circuit states that it "agree[s]" with the brief submitted by the RBOCS/GTE and NYNEX and that Ameritech believes the FCC's most favored nations (or pick and choose) rule should be vacated. See Ameritech Brief in Iowa Utils. Bd. v. FCC, No. 96-3321 at 2. The RBOC/GTE brief also calls for the vacating of the MFN provision. See RBOC/GTE Brief in Iowa Utils. Bd. v. FCC, No. 96-3321 at 77-80 (pick and choose rules are unlawful). Sprint is unaware of any effort Ameritech might have made to convey its asserted change in position to the Eighth Circuit.

46 See TCG Comments, MPSC # U-11104 (Jan. 9, 1997)(Vol. 4.1, Part 5).

47 See Ameritech Submission of Information, MPSC # U-11104 at 11-12 (March 27, 1997)(Vol. 4.1, Part 9). See also Edwards Aff. at ¶¶ 14-17.

Order once issued. (Br. at 4 n.5). Given Ameritech's early objections,[48] uncured by more recent favorable but ambiguous statements, there can be no assurance that the most favored nations principles will survive, either by law or by contract.

This should be deemed fatal for purposes of determining Section 271 compliance. Given the FCC's recognition of the competitive significance of MFN obligations, the Commission should impose a granulated MFN obligation as a Section 271 requirement.

C. Ameritech's Inability to Demonstrate OSS Deployment Renders Its Application Defective.

The Commission has said that OSS systems are "critical" to CLECs' ability to "compete with incumbent LECs" and that CLECs "will be severely disadvantaged, if not precluded altogether from fairly competing" if they are unable to access OSS functions in the same manner as incumbent ILECs. See Interconnection Order, 11 FCC Rcd 15763-64, ¶ 518. In light of their importance, the Commission required that OSS be achieved as a prerequisite for Section 271 compliance. See Interconnection Order, *Second Order On Reconsideration*, 5 Comm. Reg. (P&F) 420, 423-24 ¶ 11 (1996). As detailed fully in the attached affidavit of Betty Reeves, Sprint's Director of Local Market Development, OSS has not yet been achieved.[49]

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[48] See Ameritech Brief in Iowa Util. Board v. FCC, No. 96-3321 at 2 (MFN rule is unlawful). See also Affidavit of Betty Reeves, Sprint's Director of Local Market Development, at ¶ 25 ("Reeves Aff."), attached to this Petition.

[49] The Wisconsin PSC has reached the same conclusion. See Wisconsin Utility Reg. Rep. at 2-8 (April 3, 1997)(noting Wisconsin PSC finding that Ameritech's OSS was "not yet fully tested and operational."), attached to AT&T Filing, MPSC

As explained by Ms. Reeves, Ameritech's operational support systems "are not operationally ready" and "have not been proven to provide parity with Ameritech's own retail division." (Reeves Aff. at ¶ 6). Ms. Reeves points out that Ameritech's pre-ordering interface is not yet capable of providing real-time access to CLECs and has been used by only one carrier for very limited purposes. Ameritech and Sprint are still negotiating an interim solution for an electronic interface for telephone number and due date selection -- functions which simply are not currently accessed electronically by any CLEC. (Id. at ¶¶ 7-8). With respect to a service ordering interface, Ms. Reeves details Ameritech's insistence to not employ the latest industry-adopted standards that are needed by most major CLECs. (Id. at ¶ 14).[50] It is hardly surprising that AT&T and MCI are experiencing substantial editing and processing problems with Ameritech's own creation. (Id. at ¶ 14).

Similar problems exist with Ameritech's maintenance and repair interface. Although Ameritech has asserted that its interface is based on industry standards, it is in actuality "an industry standard for exchanging repair and maintenance information related to access services that is not operational with all IXCs, including Sprint." (Id. at ¶ 15). That distinction is critical because the maintenance and repair processes involved in local service -- via resale or UNEs -- "vary significantly" from those involved in the access arena. (Id.). As stated by Ms. Reeves, "Sprint can not effectively enter

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U-11104 (April 18, 1997)(Vol. 4.1, Part 11).

50 In hearings before the MPSC, Ameritech has admitted that its OSS interfaces "were not the formats . . . that a lot of the CLECs wanted." See Testimony of Michael Karson, MPSC # U-11104, Transcript at 198 (May 28, 1997).

the local market within the Ameritech region until an acceptable maintenance and repair [interface] is tested and deployed." (Id. at ¶ 16).

Ms. Reeves also notes that Ameritech's OSS interfaces have not been adequately tested as demonstrated by their high failure rate. (Id. at ¶¶ 19 & 22). In fact, CLECs have raised numerous complaints about Ameritech's interfaces.[51] LCI, for example, cannot timely bill its customers because Ameritech takes several months to transmit usage data to LCI.[52] Likewise, Brooks Fiber has complained that Ameritech completed only 63% of Brook's orders on time in March of 1997.[53]

Ameritech's failure to properly stress test its OSS interfaces should be considered in the light of the company's statements to the FCC trying to justify its unlawful interLATA test. There, Ameritech asserted a trial is necessary because the new interfaces it has been developing for its long distance affiliate "must be exhaustively tested, tuned, and refined before Ameritech enters the long distance market." (Letter from Lynn S. Starr, Ameritech Director for Federal Relations, to Regina Keeney, Chief Common Carrier Bureau, 2 (April 21, 1997)). Such "exhaustive testing," says Ameritech, requires "a peak load of twenty thousand orders per day." (Id. at 3).

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51 LCI and CompTel have gathered many of the complaints leveled against Ameritech's OSS interfaces by other CLECs. See LCI/CompTel Pet. for Expedited Rulemaking in CC Docket No. 96-98, at 34-49 (May 30, 1997)(discussing numerous problems with Ameritech's OSS interfaces).

52 See Anne K. Bingaman, Statement Before the FCC Open Forum Regarding OSS, at 2-5 (May 28, 1997).

53 See Brooks Fiber Additional Information Filing, MPSC #U-11104 at 3 (May 14, 1997)(Vol. 4.1, Part 14).